UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 97-22-B-H***
	)	***(Civil No. 98-164-B-H)***
BEVERLY R. MONTGOMERY,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

The defendant, appearing *pro se*, moves this court to vacate, set aside or correct her sentence pursuant to 28 U.S.C. § 2255. A sentence of 144 months was imposed after she pleaded guilty to two counts of distribution of a controlled substance and aiding and abetting the distribution of a controlled substance, violations of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.[1] Judgment (Docket No. 21) at 1-2. The defendant now contends that she "signed away" her right to appeal in violation of the U. S. Constitution; that the court erred in calculating her criminal history category under the United States Sentencing Commission Guidelines ("U.S.S.G.") and in refusing to make an adjustment in her criminal offense category, also pursuant to the Guidelines; that her attorney did not "[fight] hard enough" for her; and that she is entitled to further reduction in her sentence by virtue of her post-conviction rehabilitation. Motion Under 28 USC § 2255 to Vacate, Set Aside, or

[1] Because a death resulted from the use of the controlled substance, the statutory minimum sentence was 240 months. 21 U.S.C. § 841(b)(1)(C). However, upon motion of the government in recognition of the defendant's substantial assistance, the court departed from the guideline range and sentenced the defendant to the 144 month term on August 15, 1997. Judgment at 1, 6.

Correct Sentence by a Person in Federal Custody ("Motion") (Docket No. 25) at 5-6.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, the defendant's allegations, accepted as true, would not entitle her to relief. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

I. Background

The defendant pleaded guilty pursuant to a written plea agreement in which she agreed that death resulted from the use of the fentanyl which she was charged with distributing. Agreement to Plead Guilty and Cooperate ("Agreement") (Docket No. 15) ¶ 1. Fentanyl is a controlled substance with the meaning of 21 U.S.C. § 841(a)(1). 21 U.S.C. § 812 (Schedule II). The government agreed to recommend a sentence of twelve years and the defendant agreed not to argue for a lesser sentence. Agreement ¶ 3. By the terms of the agreement, the defendant was not allowed to withdraw her guilty plea. *Id*.

On May 16, 1997 the defendant entered her plea. Transcript of Proceedings, Change of Plea (Docket No. 28) at 5, 12. At the hearing at which the defendant entered her plea, the court informed her that if she did so, she would have no right of appeal from her conviction but would be able to appeal her sentence. *Id*. at 12, 23, 25. At her sentencing, the defendant was again informed that she could appeal the sentence imposed. Transcript, Presentence Conference and Sentencing, at 55. The defendant took no appeal.

III. Discussion

The defendant states in her motion, although not as a ground for relief, "I was told that I could not appeal this and have just now found out that I could file an appeal." Motion at 4. To the extent that this statement is intended to assert grounds for collateral relief, it provides the defendant with no such entitlement. If the statement refers to the conviction based upon her plea, it is incorrect. *United States v. Karger*, 439 F.2d 1108, 1109 (1st Cir. 1971) (guilty plea waives claims directly related to determination of guilt or innocence). If the statement refers to the sentence imposed, it is also incorrect. It is clear from the transcripts of the plea and sentencing hearings that the defendant was informed that she could appeal from any sentence that might be imposed. There is no basis for relief on this ground.

The defendant's first stated ground for the motion is "The [Sixth] A[]mendment states that not knowing what you[']re going to get for a sentence then signing your right to appeal away is in violation of the Constitution." Motion at 5. The Sixth Amendment provides, in its entirety:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

U. S. Const. amend. VI. Nothing in this language supports the defendant's interpretation. Indeed, the defendant's interpretation is fundamentally at odds with the long-standing principle of American law that only the court may determine the sentence to be imposed upon conviction of a crime. *E.g.*, *In re Yielding*, 599 F.2d 251, 253 (8th Cir. 1979) (court cannot be compelled to consider plea agreement). No one can promise a defendant a particular sentence. *See United States v. Muriel*, 111

F.3d 975, 980 (1st Cir. 1997) ("the government . . . could only make the agreed-to recommendations to the court and could not guarantee that Muriel would receive a particular sentence. Sentencing is within the discretion of the district court."); *see also* Fed. R. Crim. P. 11(e). A defendant may plead guilty, as the defendant did in this case, in hopes of obtaining a reduced sentence. By pleading guilty, she loses the ability to appeal issues concerning her guilt or innocence. The Sixth Amendment does not guarantee that a defendant pleading guilty will know in advance what her sentence will be. The law is directly to the contrary.

The second and third grounds asserted in the defendant's motion concern the court's application of the sentencing guidelines. She claims that the court erred in assigning one point to her criminal history score for a state-court conviction for aggravated forgery because the sentence for that conviction had been imposed over ten years before sentencing on the current conviction and that the court erred in refusing to apply a section of the sentencing guidelines that allows a reduction in base offense level for a defendant's minimal role in the offense.[2] Motion at 5. The government correctly contends that these non-constitutional claims are not cognizable under section 2255, absent exceptional circumstances not present here, because they could have been raised on direct appeal but were not. *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). Even if that were not the case, the claims would fail on their merits. Because the crime to which the defendant pleaded guilty carried a statutory minimum sentence of 20 years, any adjustments that would bring the sentencing range pursuant to the Guidelines below a minimum of 240 months would have no effect. *United*

[2] Also included in the defendant's motion at this point is the statement "And mistakes were made on PSI." Motion at 5. In the absence of specification of the alleged mistakes, this statement is at most a "bald assertion without sufficiently particular and supportive allegations of fact" and accordingly cannot provide the basis for section 2255 relief. *Barrett v. United States*, 965 F.2d 1184, 1186 (1st Cir. 1992) (internal quotation marks and citation omitted).

States v. Rodriguez, 938 F.2d 319, 320 (1st Cir. 1991) (sentencing guidelines do not supercede statutory minimum sentences); U.S.S.G. § 5G1.1(b). Contrary to the defendant's argument, this court could not apply the downward adjustments to which she contends she was entitled to the 12-year sentence it imposed as a result of the government's motion. Those adjustments are only applicable to the calculation of a sentence within the Guidelines.

The defendant contends, in connection with her claim of entitlement to a downward adjustment for a minimal role, that the disparity between her sentence and the sentences imposed on the two individuals who provided her with the fentanyl she sold "is too much sentencing disparity." Motion at [8]. This is not an acceptable basis for reduction in a sentence. *United States v. Wogan*, 938 F.2d 1446, 1448-49 (1st Cir. 1991).

The defendant's next asserted ground for relief is that her counsel did not "[fight] hard enough for me," Motion at 6, and that the court refused to appoint the attorney of her choice to represent her at government expense, *id*. at 6, [8] and Montgomery's Traverse ("Reply") (Docket No. 39) at 1-2. To support her claim concerning her appointed counsel, the defendant asserts that her counsel "wanted me to go along with what the DA was saying right from the beginning," she was prejudiced against drug dealers, she told the defendant not to question her professionalism, she told the defendant that she had no appealable issues, she told the defendant to cooperate with the government, she did not try to convince the court to impose a sentence with a term of fewer than 12 years, and she did not emphasize the defendant's accomplishments in oral argument at the sentencing hearing. Motion at 6, [8]; Reply at 1-3. Of course, the defendant's counsel was bound by the plea agreement not to argue for a sentence lower than 12 years. The defendant has not identified any issues on which an appeal of her sentence would have been likely to succeed.

In order to obtain relief under section 2255 based on any of the other assertions about her counsel, the defendant would have to establish that her counsel's performance was constitutionally deficient under the standard established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). None of the asserted "errors," if indeed the defendant's remaining assertions can be characterized as such, is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. In addition, the second part of the *Strickland* standard requires that the defendant show that any error by her counsel was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687. Any asserted error must have prejudiced the defendant in order to constitute constitutionally ineffective assistance. *Id*. at 691-92. In other words, the defendant must show that there is a reasonable probability that the outcome would have been different but for her counsel's errors. None of the actions or inactions of her trial counsel listed by the defendant meets either part of the *Strickland* test. At best, the items listed by the defendant are sources of dissatisfaction for her, viewed with the benefit of hindsight. The listed complaints, whether taken individually or together, simply do not constitute evidence that the defendant was deprived of adequate assistance of counsel.

The defendant next argues that she is entitled to a reduction in her sentence by virtue of her post-conviction rehabilitation, specifically, completion of two parenting classes and a 500-hour drug abuse program that the court recommended she pursue while incarcerated. Motion at 6, [8]; Reply at 7-8. These were efforts undertaken after sentence was imposed. She concedes that her sentence has been reduced by one year for successful completion of the drug abuse program. Reply at 8. She

requests an additional two-year reduction. *Id*. The defendant cites *Koon v. United States*, 518 U.S. 81 (1996), in support of her request. In that case, the Supreme Court dealt with an appeal from the initial sentencing of the defendant. *Id*. at 88. Nothing in the text of the opinion in that case authorizes a downward departure in a sentence after the sentence has been imposed and the defendant is serving it. *See United States v. Sklar*, 920 F.2d 107, 115-16 (1st Cir. 1990) (discussing only rehabilitation occurring before sentence is imposed as a consideration in sentencing). None of the other opinions cited by the defendant in support of her argument on this point, Reply at 8-9, involves consideration of rehabilitation that occurred after the defendant began serving the sentence at issue, and none adopts rehabilitation as a basis for relief under section 2255. The defendant presents no reason why this court should do so.

The defendant's claim that, having been found indigent, she was nonetheless entitled to appointment of counsel of her own choosing, and that the failure of the court to accede to her request entitles her to relief under section 2255, requires little discussion. In the First Circuit, for indigent defendants, "there is no absolute right to a counsel of one's own choice." *United States v. Pina*, 844 F.2d 1, 6 (1st Cir. 1988). "[W]hile a defendant may not be forced to proceed to trial with an incompetent or unprepared counsel," *id*., the defendant here made no showing at the time she pleaded guilty and was sentenced and has made no showing here that her appointed counsel was either incompetent or unprepared. *See also United States v. Graham*, 91 F.3d 213, 217 (D.C.Cir. 1996); *United States v. Ely*, 719 F.2d 902, 905 (7th Cir. 1983) (discussing reasons why indigent criminal defendants are not entitled to counsel of their choice). The defendant is not entitled to section 2255 relief on this basis.

The defendant's final argument is that she is entitled to relief due to prosecutorial

misconduct, specifically the alleged refusal of the government to seek further reduction in her sentence under Fed. R. Crim. P. 35 in return for unspecified information that she has provided since her incarceration.[3] Motion at [8]; Reply at 6-7. The government responds that the court lacks jurisdiction to award relief on this basis because the claim is not one that can be reviewed under section 2255 and because invocation of Rule 35(b) is the sole province of the prosecutor and the decision not to invoke Rule 35(b) is not subject to court review. Government Opposition to Motion to Vacate, Set Aside, or Correct Sentence (Docket No. 32) at 31-32.

Rule 35(b) provides:

> If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after the sentence is imposed. In evaluating whether substantive assistance has been rendered, the court may consider the defendant's presentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.[4]

A defendant has no constitutional right to a sentence reduction under Rule 35. *United States v. Francois*, 889 F.2d 1341, 1345 (4th Cir. 1989). It follows, therefore, that the government's failure to bring a motion under the rule cannot invest the defendant's current sentence with a constitutional

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[3] I have searched in vain for any reported case in which a court has held that a failure to bring a Rule 35 motion constitutes prosecutorial misconduct. I consider it highly unlikely that any court would so conclude, but it is not necessary to reach that issue under the circumstances present here.

[4] This is the amended version of Rule 35(b), effective December 1, 1998. Its use here is appropriate because it creates no unfairness to the defendant and will not change the outcome of this proceeding. *Legault v. Zambarano*, 105 F.3d 24, 27 n.1 (1st Cir. 1997).

infirmity. The defendant has made no attempt to show that the government's failure to make a request on her behalf under Rule 35(b) violates any federal law. The only remaining basis upon which relief is available under section 2255 for such a claim is a showing that the sentence is "otherwise subject to collateral attack" for this reason.

In the First Circuit, this category

> includes only assignments of error that reveal fundamental defects which, if uncorrected, will result in a complete miscarriage of justice, or irregularities that are inconsistent with the rudimentary demands of fair procedure. In other words, apart from claims of constitutional or jurisdictional nature, a cognizable section 2255 claim must reveal exceptional circumstances that make the need for redress evident. The burden is on the petitioner to make out a case for section 2255 relief.

David v. United States, 134 F.3d 470, 474 (1st Cir. 1998) (internal quotation marks, brackets and citations omitted). Here, the defendant has offered nothing beyond a conclusory allegation that, on one occasion following her incarceration, she provided information to the assistant United States attorney who prosecuted her and that she attempted to do so on one other occasion. Reply at 7. This falls far short of a showing of exceptional circumstances warranting additional reduction in her sentence over the objection of the government, if such relief were possible, a question which it is not necessary for the court to resolve under the circumstances present in this case. The defendant is not entitled to relief under section 2255 on this basis.[5]

[5] The defendant also mentions U.S.S.G. § 5K2.0 and 18 U.S.C. § 3553(b) in connection with her motion on this issue. Reply at 7. Both pertain only to consideration that the court may give to certain factors when imposing sentence. Neither provides this court with any power to change a sentence after it has been imposed. Rule 35 provides the procedural means for such changes.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct her sentence be **DENIED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 4th day of December, 1998.

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David M. Cohen
United States Magistrate Judge